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The Extension of Comity to Foreign Bankruptcy Proceedings: Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.

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Cover Page Footnote

International Law; Commercial Law; Law

NOTE

The Extension of Comity to Foreign Bankruptcy Proceedings: *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*

I. Introduction

As commercial transactions have become increasingly international in nature, the prospect of being embroiled in a dispute with a foreign corporation involved in a foreign bankruptcy proceeding has likewise become more widespread. Bankruptcy¹ proceedings in one country will often have serious ramifications for creditors located in other countries. As a result of the lack of formal cooperation among countries, at present there exists no uniform international bankruptcy law or method for courts to apply when dealing with international bankruptcies. Courts have, of necessity, been forced to rely on the "nebulous"² doctrine of international comity³ to provide them with some guidance on how to approach foreign bankruptcy proceedings. Comity is generally defined as a rule of courtesy whereby a court defers to the concomitant jurisdiction of another court already exercising jurisdiction over the matter in question.⁴ The Third Circuit Court of Appeals, in *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico*,⁵ directly addressed the question of what factors and policies a federal court should consider when presented with a request for the extension of comity to a foreign bankruptcy proceeding.⁶ Although the *Philadelphia Gear* court was not the first court to enumerate the relevant factors in balancing the potentially conflicting policy concerns inherent in the

¹ The term "bankruptcy" as used in this Note refers to the different types of insolvency proceedings recognized under the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 (1988 & Supp. V 1993), including reorganizations and liquidations.

² Stacey A. Morales & Barbara A. Deutsch, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 BUS. LAW. 1573, 1587 (1984).

³ For the definition of the "doctrine of international comity," see *infra* note 54 and accompanying text.

⁴ BARRON'S LAW DICTIONARY 81 (3d ed. 1991).

⁵ *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*, 44 F.3d 187 (3d Cir. 1994).

⁶ Extending comity to a foreign bankruptcy proceeding usually involves either the staying, transferring, or dismissal of an action (pending before a U.S. court) in which the bankrupt debtor is named as a defendant, on the ground that the debtor has commenced or is presently involved in bankruptcy proceedings in a foreign country.

concept of comity,⁷ *Philadelphia Gear* did outline the procedure to be followed by a court when determining whether or not to extend comity to a foreign bankruptcy proceeding.⁸ In doing so, the court clearly established a strong presumption favoring the extension of comity, placing the burden on the district courts to develop and fully explain the reasons for their denial of comity in a particular case.⁹

This Note analyzes *Philadelphia Gear's* interpretation of the comity doctrine as it relates to international bankruptcies. Part II of this Note discusses the facts and holdings of *Philadelphia Gear*.¹⁰ Part III explores the relevant background law, focusing on the policy considerations underlying the concept of comity,¹¹ and the competing approaches courts have taken toward the recognition of foreign bankruptcy proceedings.¹² Part IV examines the procedure developed by the Third Circuit for district courts to follow when making comity determinations, in light of the recent case law.¹³ Finally, this Note concludes that the *Philadelphia Gear* court's adoption of a more expansive view of comity is consistent with the modern trend favoring the extension of comity and with congressional intent to encourage comity in the foreign bankruptcy context.¹⁴

II. Statement of the Case

A. Factual Background

In 1968, pursuant to an agreement, Philadelphia Gear Corporation (PGC) and several Mexican investors formed Philadelphia Gear Mexicana, later known as Philadelphia Gear de Mexico (PGMex).¹⁵ Under the agreement, PGMex was to manufacture PGC's products in Mexico.¹⁶ The PGMex entity was to last for a term of 99 years.¹⁷ A separate sales agreement gave PGMex exclusive rights to sell PGC products in Mexico.¹⁸ In a third agreement (1968 Technical Assistance Agreement), PGC agreed to provide technical assistance for

⁷ See, e.g., *Remington Rand Corp. v. Business Sys. Inc.*, 830 F.2d 1260, 1266-68 (3d Cir. 1987); *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 456-59 (2d Cir. 1985).

⁸ See *infra* notes 39-45 and accompanying text.

⁹ See *infra* notes 175-83 and accompanying text.

¹⁰ See *infra* notes 15-53 and accompanying text.

¹¹ See *infra* notes 59-77 and accompanying text.

¹² See *infra* notes 78-94, 108-70, and accompanying text.

¹³ See *infra* notes 171-91 and accompanying text.

¹⁴ See *infra* notes 192-95 and accompanying text.

¹⁵ *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*, No. 91-6250, 1993 U.S. Dist. LEXIS 17210, at *2 (E.D. Pa. Dec. 8, 1993). At the time Philadelphia Gear Mexicana was formed, PGC owned a 49% interest in the company and the Mexican investors owned a 51% interest. In 1987, Philadelphia Gear Mexicana merged into PGMex. See *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*, 44 F.3d 187, 189 (3d Cir. 1994).

¹⁶ *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*, 1993 U.S. Dist. LEXIS 17210, at *2.

¹⁷ *Id.*

¹⁸ *Id.* However, in subsequent agreements, PGC expressly reserved the right to appoint other distributors for its products. *Id.* at *3.

PGMex to manufacture PGC products in Mexico, and to license PGC's trademark and patents for that purpose.¹⁹ From 1968 through 1990, PGC and PGMex executed various agreements governing their relationship,²⁰ including a 1988 Technical Agreement²¹ and a 1990 Sales Agreement.²² Both agreements contained termination clauses.²³ In 1991, a dispute arose as to whether PGC had properly terminated its contractual relationship with PGMex in accordance with the terms of the termination clauses. This dispute led to PGC's filing a complaint against PGMex in the U.S. District Court for the Eastern District of Pennsylvania.²⁴

1. *The District Court*

At the district court level, PGC was seeking a declaration that it had properly terminated the 1988 Technical Agreement and the 1990 Sales Agreement, and for this reason, PGMex no longer had a contractual right to continue to: (1) use the trademark "Philadelphia Gear"; (2) manufacture or sell PGC products in Mexico; (3) act as PGC's sales representative in Mexico; or (4) retain PGC's technical material, data, and drawings.²⁵ PGMex filed its answer and a counterclaim alleging that PGC had breached its agreements with PGMex.²⁶ On July 20, 1993, PGC filed a motion for summary judgment on both its complaint and PGMex's counterclaim.²⁷ On October 5, while PGC's motion for summary judgment was pending, the district court received a Letter Rogatory²⁸ from a Mexican court, requesting that the district court stay or transfer the pending action to Mexico.²⁹ The Mexican court issued

¹⁹ *Id.* at *4. The Agreement also provided that PGMex would not have to pay a fee for technical assistance so long as PGC remained a 49% shareholder in PGMex. In 1986 and 1987, however, one of the Mexican investors agreed to pay license fees in return for PGC's technical assistance. *Id.* at *4-5.

²⁰ *Id.*

²¹ *Id.* at *5.

²² *Id.* at *3.

²³ The 1988 Technical Agreement contained a clause which expressly stated that parties were entitled to terminate the Agreement by giving three months written notice, upon the occurrence of specified events. *Id.* at *5. The 1990 Sales Agreement contained a termination clause stating that the Agreement would remain in force until either party gave the other thirty days written notice of its intention to terminate, without cause. *Id.* at *3.

²⁴ *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*, 44 F.3d 187, 190 (3d Cir. 1994).

²⁵ *Id.*

²⁶ *Id.* PGMex had made a motion to dismiss on the grounds of forum non conveniens, which the district court had denied. *Id.*

²⁷ *Id.* PGMex filed its opposition to the motion for summary judgment on August 31, 1993. *Id.*

²⁸ A "Letter Rogatory" is a "formal communication from a court in which an action is pending, to a foreign court," generally used to request that the testimony of a witness residing in such foreign jurisdiction be taken by the court to which the letter was sent. *BARRON'S LAW DICTIONARY* 427 (3d ed. 1991). In *Philadelphia Gear*, however, the Letter Rogatory was used as a formal communication by the Mexican court to request that comity be extended to the Mexican proceedings. 44 F.3d at 190.

²⁹ *Philadelphia Gear*, 44 F.3d at 190. The Third Circuit noted that there appeared to be a

the letter at the request of PGMex, which had instituted a suspension of payments proceeding in Mexico pursuant to Mexican law.³⁰ PGC filed its brief in opposition to the relief sought in the letter, along with the opinion of a Mexican attorney contending that the Letter Rogatory was ineffective.³¹

On December 9, 1993, the district court granted summary judgment to PGC on both the complaint and the counterclaim, without making *any* reference in its opinion to the Letter Rogatory.³² On December 10, PGMex filed its brief in support of the Letter Rogatory, along with the opinion of a Mexican attorney asserting that the letter should be honored.³³ PGMex then appealed to the Third Circuit, challenging: (1) the district court's refusal to extend comity to the Mexican bankruptcy proceeding, and (2) the district court's grant of summary judgment to PGC.³⁴

2. *The Court of Appeals*

a. *The Majority*

The Third Circuit focused solely on the issue of whether the district court had abused its discretion in not extending comity to the Letter Rogatory.³⁵ The court held that PGMex had presented a *prima facie* case for the extension of comity to the Mexican bankruptcy proceeding and that the district court had abused its discretion³⁶ when it granted summary judgment to PGC without making any factual findings on the comity issue.³⁷ Because the Third Circuit could not con-

discrepancy in the parties' briefs as to who had served the Letter Rogatory on the district court; however, the Third Circuit treated the method of service as irrelevant for purposes of the appeal since neither party made an issue of it on appeal. *Id.* at 190 n.1.

³⁰ *Id.* at 190. PGC described the suspension of payments proceeding under the Mexican Bankruptcy and Suspension of Payments Laws (MBSPL) as "somewhat analogous" to Chapter 11's reorganization proceedings under the U.S. Bankruptcy Code. *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 191. As an initial matter, the Third Circuit addressed the fact that PGMex had not made a formal *motion* for a stay or transfer to the Mexican court. *Id.* at 191-92. The court stated that usually a court, in determining whether to extend comity to a foreign proceeding, rules in response to a motion by a party seeking a stay pending disposition of the foreign proceeding. *Id.* Nevertheless, the court concluded that PGMex's failure to make a formal motion "does not compel the conclusion that the district court should not have extended comity to the Mexican [bankruptcy] proceedings." *Id.* at 192. The court went on to state that "whatever might be true in other cases, the absence of a formal motion does not matter in this case." *Id.* In this case, the court reasoned that the Letter Rogatory served the same procedural function as a motion since it informed the district court and the parties of the relief sought, and further, that PGMex's brief in support of the Letter Rogatory acted as the "functional equivalent of a motion." *Id.*

³⁶ The *Philadelphia Gear* court stated that since a court may, within its discretion, deny comity to a foreign judicial proceeding, the court would review the extension or denial of comity by the "abuse of discretion" standard. *Id.* at 191.

³⁷ *Id.* at 193-94. This holding made it unnecessary for the court to reach the merits of PGMex's appeal from the grant of summary judgment to PGC. *Id.* at 191.

clude that comity should have been denied as a matter of law, the court vacated the order for summary judgment and remanded the action to the district court.³⁸ On remand, the district court was instructed to follow the procedure outlined in *Philadelphia Gear*, and to explain the basis for its denial of comity to the Mexican bankruptcy proceeding, should the district court so rule.³⁹

Drawing on an earlier Third Circuit decision, *Remington Rand Corp. v. Business Systems Inc.*,⁴⁰ the court outlined the procedure that the district court was to follow in determining whether or not to extend comity to the Mexican bankruptcy proceeding. A party seeking a stay⁴¹ of a judicial proceeding in the United States, based on the existence of a foreign bankruptcy proceeding, must present a prima facie case for a stay by demonstrating that: "(1) the foreign bankruptcy court shares the U.S. policy of equitable distribution of assets; and (2) the foreign law mandates the issuance or at least authorizes the request for a stay."⁴² Then, if the party requesting comity has made such a prima facie showing, which the Third Circuit held PGMex had made, the district court, in exercising its discretion to grant or deny comity to a foreign bankruptcy proceeding, should determine whether according comity to the foreign bankruptcy proceedings "would be prejudicial to the interest[s] of the United States."⁴³ The court stated:

In making [this] inquiry, the court should assess, along with any other issues it finds relevant, the following issues: (1) whether the [foreign bankruptcy] court in which the proceedings are pending is a duly authorized tribunal; (2) whether the [foreign bankruptcy law] provides for equal treatment of creditors; (3) whether a stay would be "in some manner inimical to [the U.S.] policy of [equal distribution of assets];" and (4) whether [U.S. creditors] would be prejudiced by the stay.⁴⁴

Moreover, the court expressly required that the district court, upon a prima facie case being made, not dismiss the request for comity without explaining its ruling and making factual findings on the comity issue.⁴⁵

³⁸ *Id.* at 193-94.

³⁹ *Id.* at 194.

⁴⁰ 830 F.2d 1260 (3d Cir. 1987).

⁴¹ The court cautioned it was only addressing the issue of what procedure to follow in determining when to "stay" an action based on comity, and was expressing no opinion on what procedure to follow when presented with a request for a "transfer" to a foreign bankruptcy court. See *Philadelphia Gear*, 44 F.3d at 194 n.7.

⁴² *Id.* at 193.

⁴³ *Id.* at 194.

⁴⁴ *Id.* In making these determinations, it may be necessary for the district court to conduct an evidentiary hearing, with expert testimony provided to ascertain foreign law and procedures, especially where such matters may be in dispute, as was the case in *Philadelphia Gear*. *Id.* at 193.

⁴⁵ *Id.* at 193-94. The court was careful to point out that it was not requiring that a court, whenever it exercises its discretion, explain the basis for its actions. An explanation, however, was required when exercising discretion in the area of comity. *Id.* at 191 n.4.

b. *The Dissent*

In his dissent, Judge Roth agreed with the majority's view that the district court "should have articulated its reasons for denying the Letter Rogatory's request for comity,"⁴⁶ but he disagreed that *Remington*⁴⁷ led to the "broad view of comity" advanced by the majority.⁴⁸

Judge Roth argued that under *Remington*,⁴⁹ it would have been inappropriate to extend comity to the Mexican bankruptcy proceedings.⁵⁰ In his view, the issues argued on summary judgment in *Philadelphia Gear* resembled the types of issues that *Remington* had held as not being precluded by considerations of comity.⁵¹ Judge Roth emphasized that because the district court's determination of the issues on summary judgment would not affect assets held by PGMex in Mexico, the district court's action did not impede the Mexican bankruptcy court's ability to effectively distribute PGMex's assets to its creditors.⁵² Thus, the district court would not have abused its discretion if it had in fact decided that comity did not preclude it from determining the merits of the summary judgment motions.⁵³

III. Background Law

A. *International Comity—General Principles*

The concept of international comity has been aptly summarized as follows:

[Comity is the] recognition which one nation extends within its own territory to the legislative, executive or judicial acts of another. It is not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws.⁵⁴

⁴⁶ *Id.* at 194 (Roth, J., dissenting).

⁴⁷ 830 F.2d 1260 (3d Cir. 1987).

⁴⁸ *Philadelphia Gear*, 44 F.3d at 194 (Roth, J., dissenting).

⁴⁹ 830 F.2d 1260.

⁵⁰ *Philadelphia Gear*, 44 F.3d at 194 (Roth, J., dissenting).

⁵¹ *Id.* For a discussion of the Third Circuit's holding in *Remington*, see *infra* notes 155-70 and accompanying text. In *Remington*, the Third Circuit upheld the district court's determination that defendant, a foreign corporation who had filed bankruptcy in The Netherlands, had misappropriated documents of the plaintiff, an American corporation, even though no explanation was provided by the district court as to why it did not defer to the Dutch bankruptcy proceedings, based on comity. 830 F.2d at 1265.

⁵² *Philadelphia Gear*, 44 F.3d at 195 (Roth, J., dissenting).

⁵³ *Id.* (Roth, J., dissenting). Judge Roth went on to review (in the interest of judicial economy) the district court's grant of summary judgment, determining that summary judgment was improperly granted because there existed numerous issues of material fact in dispute. *Id.* (Roth, J., dissenting).

⁵⁴ *Sompotex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972); see also *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

As a general rule, if a party requesting⁵⁵ that comity be extended to a foreign proceeding demonstrates that the foreign court is a court of competent jurisdiction and that the laws and public policy of the forum nation and the rights of its residents will not be violated, comity will usually be granted to the foreign judgment or proceeding.⁵⁶ Comity should be denied *only when* its extension would be prejudicial to the interests of the forum nation.⁵⁷

B. Comity in the Foreign Bankruptcy Context

1. Policy Considerations

Policy considerations are implicated whenever a U.S. court is presented with a request for comity to be extended to a foreign bankruptcy proceeding. A court, in making its determination whether or not to extend comity to the foreign bankruptcy proceedings, must carefully balance what are often competing domestic and foreign policy concerns.⁵⁸

a. Pro-Comity Policy Considerations

In the foreign bankruptcy arena, several policy considerations make the extension of comity to foreign bankruptcy proceedings particularly appropriate.⁵⁹ U.S. courts recognize the interest that foreign courts have in liquidating or winding up the affairs of their own domestic businesses,⁶⁰ and the Supreme Court has, since 1883, put those who do business with foreign corporations on notice that they are impliedly subjecting themselves to foreign bankruptcy laws.⁶¹ As such, creditors of a bankrupt foreign corporation may be required to assert their claims against the foreign bankrupt before a foreign bankruptcy

⁵⁵ A request for comity usually requires the party seeking comity to make a motion to the U.S. court in which the action is pending, requesting that the action be stayed, transferred, or dismissed on the grounds of comity. But see *supra* note 35, where the *Philadelphia Gear* court waived the requirement of a formal motion for comity.

⁵⁶ *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457 (2d Cir. 1985); *accord* *Clarkson Co. v. Shaheen*, 544 F.2d 624, 629 (2d Cir. 1976); *Kenner Prods. Co. v. Societe Fonciere Et Financiere Agache-Willot*, 532 F. Supp. 478, 479 (S.D.N.Y. 1982); *Pravin Banker Assoc. v. Banco Popular del Peru*, 165 Bankr. 379, 384 (Bankr. S.D.N.Y. 1994).

⁵⁷ *Somportex*, 453 F.2d at 440; *see also* *Matter of Colorado Corp.*, 531 F.2d 463, 468 (10th Cir. 1976); 16 AM. JUR. 2D *Conflict of Laws* § 6 (1964).

⁵⁸ *See infra* notes 59-77 and accompanying text.

⁵⁹ *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987) ("American courts have long recognized the particular need to extend comity to foreign bankruptcy proceedings.")

⁶⁰ *Cunard*, 773 F.2d at 458.

⁶¹ *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527, 537-39 (1883) (holding that U.S. bondholders of a Canadian railroad company were bound by the Canadian reorganization plan and were barred from suing in a New York court to recover on the bonds). It is important to note, however, that in *Gebhard*, the reorganization plan was created by the Canadian government via statute and that the Court's analysis seemed to be heavily influenced by this fact. *See Morales & Deutsch, supra* note 2, at 1578-79.

court.⁶² The most compelling rationale for extending comity to foreign bankruptcy proceedings is the need for the centralization of claims against a bankrupt debtor's assets to ensure that the assets of the debtor may be distributed to creditors in an "equitable, orderly and systematic manner,"⁶³ instead of in a "haphazard, erratic or piecemeal fashion."⁶⁴ Because a fundamental principle of U.S. bankruptcy law is that a debtor's assets be distributed equally and fairly among creditors of similar standing,⁶⁵ if the foreign bankruptcy law shares this "fundamental principle of equality,"⁶⁶ the extension of comity to the foreign bankruptcy proceeding will be heavily favored.⁶⁷

b. Anti-Comity Policy Considerations

Despite the foregoing policies encouraging comity,⁶⁸ the extension of comity to foreign bankruptcy proceedings is neither mandatory nor automatic. Because comity is an exercise of a court's discretion in light of the facts of a specific case,⁶⁹ U.S. courts are free to balance potentially conflicting policy considerations and to deny comity to foreign bankruptcies.

Cutting against the extension of comity is a court's duty to protect U.S. creditors from being forced to press their claims in a foreign proceeding wherein "their claims will be treated in some manner inimical" to the U.S. policy of equality.⁷⁰ As a result of this rather vague stan-

⁶² *Cunard*, 773 F.2d at 458-59; *Remington Rand Corp. v. Business Sys. Inc.*, 830 F.2d 1260, 1271 (3d Cir. 1987).

⁶³ *Cunard*, 773 F.2d at 458.

⁶⁴ *Id.*

⁶⁵ *Remington*, 830 F.2d at 1271; see also *Cunard*, 773 F.2d at 459 ("The guiding premise of the Bankruptcy Code . . . is the equality of distribution of assets among creditors."); *Kenner Prods. Co. v. Societe Fonciere Et Financiere Agache-Willot*, 532 F. Supp. 478, 479 (S.D.N.Y. 1992) ("United States bankruptcy law itself provides for . . . [the] efficient and fair distribution of assets. . .").

⁶⁶ *Remington*, 830 F.2d at 1271; see also *Cunard*, 773 F.2d at 459 ("The guiding premise of the Bankruptcy Code . . . is the equality of distribution of assets among creditors."); *Kenner*, 532 F. Supp. at 479 ("United States bankruptcy law itself provides for . . . [the] efficient and fair distribution of assets . . .").

⁶⁷ See, e.g., *Kenner*, 532 F. Supp. at 479 (citing *Cornfeld v. Investors Overseas Serv., Ltd.*, 471 F. Supp. 1255, 1259 (S.D.N.Y. 1979)) (where the laws or public policy of the United States are not violated, it is the "firm policy of American courts [to stay] actions against a corporation which is the subject of a bankruptcy proceeding in another jurisdiction"); see also *In Re Banco Nacional de Obras y Servicios Publicos*, S.N.C., 91 B.R. 661, 667 (Bankr. S.D.N.Y. 1988) ("so long as the foreign law is not repugnant to our own, the scale will ordinarily tip in favor of having the foreign tribunal liquidate claims against the estate") [hereinafter *Banobras*]. However, the *Banobras* court concluded that comity should be denied to the foreign bankruptcy proceeding pending in Mexico because resolution of the terms of the collective bargaining agreement at issue before the court would require "special expertise" in American labor law, an area in which important Congressional policy considerations abound. *Id.* at 667-68.

⁶⁸ See *supra* notes 59-67 and accompanying text.

⁶⁹ See *Morales & Deutsch*, *supra* note 2, at 1576.

⁷⁰ *Remington Rand Corp. v. Business Sys. Inc.*, 830 F.2d 1260, 1271 (3d Cir. 1987) (citing *Banque de Financement S.A. v. First Nat'l Bank of Boston*, 568 F.2d 911, 921 (2d Cir.

dard, the obligation to protect the interests of U.S. citizens may act as a significant limitation on the extension of comity.⁷¹ Further, while U.S. courts recognize the interests of foreign courts in winding up the affairs of their domestic business debtors, there are exceptions to this general policy.⁷² Some New York courts have stated that they will defer to foreign bankruptcy proceedings only once they have satisfied themselves that the foreign authority has jurisdiction over the bankrupt debtor, and that "the foreign proceeding has not resulted in injustice to New York citizens, prejudice to creditors' *New York statutory remedies*, or violation of the laws or public policy of the [United States]"⁷³ By using such an imprecise standard to determine whether comity should be granted, the courts can effectively require that the foreign bankruptcy proceeding be, in essence, almost identical to that of the United States.⁷⁴ Moreover, courts remain free to consider reciprocal comity⁷⁵ as a factor when determining whether to extend comity to a foreign bankruptcy proceeding,⁷⁶ although this is generally disfavored as a condition to a U.S. court extending comity to a foreign bankruptcy proceeding.⁷⁷

1977)); see also *supra* notes 65-67 and accompanying text (discussing the U.S. "fundamental principle of equality").

⁷¹ See *Morales & Deutsch*, *supra* note 2, at 1576; see also *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 65 B.R. 466, 468 (Bankr. S.D.N.Y. 1986) (before extending comity, a court must first make sure that forum creditors will be protected in the foreign proceeding). However, the *Victrix* court did note that "the modern view rejects parochial protection of local creditors in the absence of a demonstration that their rights are unprotected in the foreign forum." *Id.*

⁷² *Drexel Burnham Lambert Group v. Galadari*, 777 F.2d 877, 880 (2d Cir. 1985).

⁷³ *Id.* (emphasis added) (quoting *Clarkson Co. v. Shaheen*, 544 F.2d 624, 629 (2d Cir. 1976)).

⁷⁴ However, recent decisions by New York courts have generally construed these grounds for the denial of comity as narrow "exceptions" to comity when the foreign jurisdiction requesting comity is a sister common-law jurisdiction with bankruptcy procedures similar to the those of the United States. See, e.g., *Clarkson*, 544 F.2d at 630 (Canadian bankruptcy proceedings should be given recognition because Canada is a sister common-law jurisdiction with procedures "akin" to those of the United States.); cf. *Kenner Prods. Co. v. Societe Fonciere Et Financiere Agache-Willot*, 532 F. Supp. 478, 479 (S.D.N.Y. 1992) (where the court extended comity to French bankruptcy proceedings, stating that New York courts narrowly construe exceptions to the comity doctrine and will enforce foreign rights unless the court's enforcement of such rights would lead to enforcement of a transaction "inherently vicious, wicked or immoral, and shocking to the prevailing moral sense" (quoting *Int'l Hotels Corp. v. Golden*, 15 N.Y.2d 9, 13 (1924))).

⁷⁵ The concept of "reciprocal comity" refers to a U.S. court granting comity to a foreign bankruptcy proceeding only if that sovereign nation's courts extend comity to U.S. bankruptcy proceedings or judgments.

⁷⁶ *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 460 (2d Cir. 1985); see *Remington Rand Corp. v. Business Sys. Inc.*, 830 F.2d 1260, 1273 (3d Cir. 1987) (stating that due to the unusual circumstances of the case, comity had to be a "two-way street" and that while reciprocity was not a condition to comity, it has always been a "permissible consideration").

⁷⁷ See, e.g., *Cunard*, 773 F.2d at 460 ("proof of reciprocity is not essential for the granting of comity"); *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971) (reciprocity is no longer an absolute condition precedent to comity). But see *supra* note 65 for a discussion of the *Remington* court's requirement that comity be reciprocal in that case.

2. *Judicial Approaches to the Interpretation of Comity*

Historically, the United States has not been very cooperative when faced with the prospect of extending comity to foreign bankruptcy proceedings.⁷⁸ The attitude of U.S. courts toward foreign bankruptcies has generally been one of hostility,⁷⁹ with the courts demonstrating "an overt nationalistic bias favoring American creditors."⁸⁰ Two contrasting approaches in dealing with foreign bankruptcy proceedings have emerged from the century that U.S. courts have been involved in international bankruptcies:⁸¹ the "territoriality" approach and the "universality" approach.⁸² The United States has adopted neither approach completely.⁸³

a. *The Territoriality Approach*

The territoriality approach presumes that bankruptcy laws should not be recognized beyond a country's borders.⁸⁴ Under this approach, each country has its own bankruptcy laws and will not recognize the extraterritorial effect of bankruptcy proceedings decided, or pending, elsewhere.⁸⁵ The advantage of the territoriality approach is that local

⁷⁸ Richard A. Gitlin & Evan D. Flaschen, *The International Void In the Law of Multinational Bankruptcies*, 42 BUS. LAW. 307, 314 (1987); see also Charles D. Booth, *Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts*, 66 AM. BANKR. L.J. 135, 136 (1992).

⁷⁹ See Gitlin & Flaschen, *supra* note 78, at 314.

⁸⁰ See Morales & Deutsch, *supra* note 2, at 1579.

⁸¹ Although the courts have dealt with international bankruptcies for over a century, U.S. courts have not dealt with this issue frequently, and the body of law that has emerged is somewhat confusing and inconsistent. See Gitlin & Flaschen, *supra* note 78, at 314; Morales & Deutsch, *supra* note 2, at 1575.

⁸² See *infra* notes 84-94 and accompanying text.

⁸³ See Booth, *supra* note 78, at 139. The modern trend (led mainly by the Second Circuit) appears to be favoring the universality approach. See, e.g., *Allstate Life Ins. Co. v. Linter Group*, 994 F.2d 996 (2d Cir. 1993); *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987); *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452 (2d Cir. 1985); *In Re Enercons Virginia, Inc.*, 812 F.2d 1469 (4th Cir. 1987); *In Re Colorado Corp.*, 531 F.2d 463 (10th Cir. 1976); *Kenner Prods. Co. v. Societe Fonciere Et Financiere Agache-Willot*, 532 F. Supp. 478 (S.D.N.Y. 1992).

However, other courts continue to employ a territorial approach towards foreign bankruptcies, thus favoring domestic creditors' interests. See, e.g., *Remington Rand Corp. v. Business Sys. Inc.*, 830 F.2d 1260 (3d Cir. 1987); *Interpool, Ltd. v. Certain Freights of the M/Vs Venture Star*, 102 B.R. 373 (Bankr. D.N.J. 1988), *appeal dismissed*, 878 F.2d 111 (3d Cir. 1989); *Overseas Inns S.A. v. United States*, 911 F.2d 1146 (5th Cir. 1990); *United Kingdom Mutual S.S. Assur. Assn. v. Continental Maritime of San Francisco*, No. C-91-2798, 1992 U.S. Dist. LEXIS 13485 (D. N.C. Aug. 31, 1992); *In Re Toga*, 28 B.R. 165 (Bankr. E.D. Mich. 1983). Even the Second Circuit has exhibited territorial tendencies in recent years. See *In Re Liquidating Comm. of Papeleras Reunidas, S.A.*, 92 Bankr. 584 (Bankr. E.D.N.Y. 1988).

For a discussion of the U.S. courts' inconsistent approaches to foreign bankruptcies, see generally Todd Kraft & Allison Aranson, *Transnational Bankruptcies: The Section 304 and Beyond*, 1993 COLUM. BUS. L. REV. 329 (1993) (urging adoption of the "Model International Insolvency Cooperation Act" (MIICA)); Tandi A. Panuska, *The Chaos of International Insolvency — Achieving Reciprocal Universality Under Section 304 or MIICA*, 6 TRANSNAT'L LAW. 373 (1993) (suggesting either requiring reciprocity under § 304 or adopting MIICA).

⁸⁴ See Gitlin & Flaschen, *supra* note 78, at 309; Booth, *supra* note 78, at 138.

⁸⁵ See Booth, *supra* note 78, at 138.

creditors benefit from local preferences and are not inconvenienced by having to dispute their claims under foreign laws.⁸⁶ The disadvantages of the territoriality approach, however, are that it hinders the principle of treating creditors equally and creates an incentive for parties to "race to the courthouse."⁸⁷ This approach also leads to the inefficient distribution of assets and "create[s] instability for companies engaging in international business transactions."⁸⁸

b. The Universality Approach

In contrast, the universality approach posits that all of the debtor's assets, in whatever country located, be subject to the exclusive jurisdiction of the court in which the bankruptcy case is pending.⁸⁹ Under this approach, creditors worldwide are required to submit their claims to the original bankruptcy court.⁹⁰ A trustee is appointed by the original bankruptcy court to collect all assets of the debtor worldwide and to seek the turnover of those assets to the original bankruptcy court.⁹¹ The original bankruptcy court's final determination is recognized by all other countries.⁹² The advantages of the universality approach are that all creditors share equally in the distribution of the debtor's assets; it is more cost efficient since duplicate proceedings in other countries are avoided; and there is increased cooperation and uniformity among countries worldwide.⁹³ The primary disadvantage is that local creditors may suffer inconvenience and hardship in litigating their claims in a foreign forum, where substantive and procedural laws may differ from those of the locality.⁹⁴

3. Congressional Enactment of Section 304

Prior to the enactment of section 304 of the Bankruptcy Code,⁹⁵

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See Gitlin & Flaschen, *supra* note 78, at 309; Booth, *supra* note 78, at 137-38.

⁹⁰ See Booth, *supra* note 78, at 138.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 11 U.S.C. § 304 (1978). Section 304 applies only to cases ancillary to foreign proceedings, and provides as follows:

(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may

(1) enjoin the commencement or continuation of

(A) any action against

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect

U.S. courts had little statutory guidance on how to approach a complex international bankruptcy dispute.⁹⁶ Instead, the courts were forced to rely mainly on the doctrine of international comity to resolve what action they should take when confronted with a foreign bankruptcy proceeding.⁹⁷ As a result, the courts wound up with a body of "confused and conflicting case law governing the adjudication of" international bankruptcy disputes,⁹⁸ with U.S. courts initially (and for a long time thereafter) favoring the territoriality approach, and only recently moving towards the universality approach.⁹⁹

In light of such confusion, in 1978, Congress attempted to facilitate the cooperation of bankruptcy courts worldwide by enacting section 304 of the Bankruptcy Code.¹⁰⁰ Section 304 was created to assist a foreign representative¹⁰¹ in bringing an ancillary bankruptcy proceeding¹⁰² in the United States, and was intended to apply *only when* the foreign debtor has "a place of business, or property" in the United States.¹⁰³ Nevertheless, section 304 has been viewed by the courts as "express[ing] Congressional recognition of an American policy favoring comity for bankruptcy proceedings."¹⁰⁴ Since section 304 was en-

to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure the economical and expeditious administration of such estate, consistent with

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

⁹⁶ See, e.g., *Remington Rand Corp. v. Business Sys. Inc.*, 830 F.2d 1260, 1271 (3d Cir. 1987).

⁹⁷ See *Morales & Deutsch*, *supra* note 2, at 1575-76.

⁹⁸ *Id.* at 1583.

⁹⁹ *Id.* at 1579; see also *Booth*, *supra* note 78, at 139.

¹⁰⁰ For the full text of § 304, see *supra* note 95.

¹⁰¹ A "foreign representative" is a trustee, administrator, or other representative of a debtor's estate in a foreign bankruptcy proceeding. 11 U.S.C. § 101(24) (Supp. V 1993).

¹⁰² An "ancillary proceeding" is one that is commenced in the United States, by a foreign representative charged with handling the debtor's estate, in aid of the principal (or original) bankruptcy proceeding abroad. See *Booth*, *supra* note 78, at 151. See generally *Booth*, *supra* note 78, for a comprehensive overview of how § 304 operates.

¹⁰³ *Id.* at 159.

¹⁰⁴ *Remington Rand Corp. v. Business Sys. Inc.*, 830 F.2d 1260, 1271 (3d Cir. 1987). In *Remington*, the court was dealing with a non-§ 304 proceeding; however, the Third Circuit looked to § 304 to determine whether Congress had enunciated an expression of public policy to assist the court in determining whether or not to extend comity to the foreign

acted in 1978, courts addressing the extension of comity to foreign bankruptcy proceedings (where the foreign representative has *not* filed a section 304¹⁰⁵ ancillary proceeding in the United States) have relied on the congressional policy behind section 304 and section 304(c) factors¹⁰⁶ to aid them in determining whether or not comity should be extended to the foreign bankruptcy proceedings.¹⁰⁷

C. Case Law Applying the Doctrine of Comity

Despite the belief that Congress favors comity, U.S. courts have continued to struggle with the basic underlying question presented in *Philadelphia Gear*: when should a U.S. court stay a domestic action properly before the court by extending comity to a foreign bankruptcy proceeding?¹⁰⁸ Although resolution of this question depends substantially on the specific facts of each particular case, the modern trend, as evidenced by recent Second Circuit decisions, seems to favor recognition of foreign bankruptcy proceedings.¹⁰⁹

In the often cited case¹¹⁰ of *Cunard Steamship Co. v. Salen Reefer Services AB*,¹¹¹ the debtor, a Swedish company, commenced a bankruptcy proceeding in Sweden.¹¹² The Swedish court appointed an administrator to supervise the estate of the debtor, and entered an order

bankruptcy proceeding. *Id.* at 1271-72. Several commentators have also interpreted § 304 as adopting a universality approach. See Kraft & Aranson, *supra* note 83, at 338.

¹⁰⁵ Foreign bankrupt debtors are not obligated to seek relief under § 304. Their foreign representatives are allowed to seek the extension of comity by filing a motion for a stay, transfer, or dismissal on the grounds of comity. See *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 455 (2d Cir. 1985) (Section 304 is not the exclusive remedy for foreign representatives because the legislative history makes it clear that the section was not intended to abrogate the doctrine of comity); *In re Enercons Virginia, Inc.*, 812 F.2d 1469, 1472 (4th Cir. 1987) (stating that nothing in the language of § 304 precludes a court from recognizing, as a matter of comity, a request by a foreign representative for a stay or injunction).

¹⁰⁶ "Comity" itself is listed as a factor to be considered when seeking relief under § 304. See 11 U.S.C. § 304(c)(5) (1982). For a list of all six factors in § 304(c), see *supra* note 95.

¹⁰⁷ Although not controlling, § 304 has been relied on by analogy in several non-§ 304 cases. See, e.g., *Remington*, 830 F.2d 1260; *Enercons*, 812 F.2d 1469.

¹⁰⁸ *Philadelphia Gear* addressed extending comity only by staying a domestic proceeding in favor of a pending foreign bankruptcy proceeding. 44 F.3d at 194 n.7 (3d Cir. 1994). However, courts, when extending comity, may grant a motion to transfer or dismiss the domestic proceedings. See, e.g., *Allstate Life Ins. Co. v. Linter Group*, 994 F.2d 996 (2d Cir. 1993) (dismissing creditors' domestic action in favor of foreign bankruptcy proceeding); *New Line Int'l Releasing Inc. v. Ivex Films, S.A.*, 140 B.R. 342 (Bankr. S.D.N.Y. 1992) (dismissing domestic action in favor of foreign bankruptcy proceeding); *Kenner Prods. Co. v. Societe Fonciere Et Financiere Agache-Willot*, 532 F. Supp. 478 (S.D.N.Y. 1992) (transferring creditor's domestic action).

¹⁰⁹ See *Morales & Deutsch*, *supra* note 2, at 1579.

¹¹⁰ See, e.g., *Allstate*, 994 F.2d at 999; *Overseas Inns S.A. v. United States*, 911 F.2d 1146, 1149 (2d Cir. 1990); *Enercons*, 812 F.2d at 1472; *Remington*, 830 F.2d at 126; *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987); *Drexel Burnham Lambert Group v. Galadari*, 777 F.2d 877, 880 (2d Cir. 1985); *Pravin Banker Assoc. v. Banco Popular del Peru*, 165 B.R. 379, 384 (Bankr. S.D.N.Y. 1994).

¹¹¹ 773 F.2d 452 (2d Cir. 1985).

¹¹² *Id.* at 454.

staying creditor actions against the debtor.¹¹³ Subsequently, plaintiff, an English creditor, obtained an order of attachment against some of the debtor's assets located in the United States.¹¹⁴ The district court vacated the attachment, determining that the public policy of the United States¹¹⁵ would be furthered by extending comity to the Swedish proceedings and by recognizing the Swedish court's stay on creditor actions.¹¹⁶ In upholding the district court's extension of comity to the Swedish bankruptcy proceedings,¹¹⁷ the Second Circuit emphasized pro-comity policy considerations: the Swedish proceeding was procedurally fair; Swedish law shared the U.S. policy of equal distribution of assets; and there was no indication that the creditor would be prejudiced if it were forced to participate in the Swedish bankruptcy proceedings.¹¹⁸

Similarly, in *Lindner Fund, Inc. v. Polly Peck Int'l PLC*,¹¹⁹ Polly Peck, a British corporation, applied to the British court for an "Administration Order"¹²⁰ to permit Polly Peck to reorganize.¹²¹ Under British law, a stay similar to the automatic stay provided by the filing of a Chapter 11 petition in the United States was triggered which prohibited the commencement or continuation of any proceeding against Polly Peck or its property.¹²² Plaintiffs, U.S. creditors, then filed an action alleging securities law violations and negligence.¹²³ The district court extended comity to the British bankruptcy proceedings by dis-

¹¹³ *Id.*

¹¹⁴ *Id.* The debtor then moved in district court to dissolve the attachment. *Id.*

¹¹⁵ The court was referring to the U.S. policy of providing for the equitable distribution of assets. *Id.* at 459.

¹¹⁶ *Id.* at 454.

¹¹⁷ The court pointed out that although the debtor's foreign representative (here, an administrator) *could have* brought an ancillary action pursuant to § 304, the administrator was not precluded from requesting that comity be extended to the Swedish bankruptcy proceedings instead. *Id.* at 455-56.

¹¹⁸ *Id.* at 459-60. See also *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987), where, in an action against the same bankrupt debtor, plaintiff, a Panamanian creditor, had obtained *both* a British arbitration award and a British judgment against the Swedish debtor, who was in bankruptcy proceedings in Sweden. *Id.* at 714. The creditor then obtained an order of attachment against some of the debtor's New York assets. *Id.* at 711. When the creditor moved in district court to enforce its foreign award and judgment, the district court denied creditor's motion and vacated the attachment. *Id.* at 712. The Second Circuit agreed with the district court's decision, stating that *Cunard* governed this action, and that in light of the debtor's ongoing bankruptcy proceeding in Sweden, enforcing the British award and judgment would conflict with the U.S. policy of ensuring the equitable distribution of the local assets of a foreign bankrupt. *Id.* at 714. The court also noted that any distribution of the debtor's limited assets would affect the other creditors who had not participated in the British proceedings, but who had instead obeyed the Swedish court's stay and sought relief in the Swedish bankruptcy proceeding. *Id.*

¹¹⁹ 143 B.R. 807 (Bankr. S.D.N.Y. 1992).

¹²⁰ An "Administration Order" is similar to a petition under Chapter 11 of the U.S. Bankruptcy Code, which deals with reorganizations. *Id.* at 808 n.2.

¹²¹ *Id.* at 808.

¹²² *Id.* at 809.

¹²³ *Id.*

missing the domestic action.¹²⁴ The court stated that "comity is regularly [extended] to bankruptcy proceedings in sister common-law jurisdictions because there is a presumption that such proceedings are fair and comport with American notions of due process."¹²⁵ Since procedures under the British bankruptcy act were comparable to procedures under the U.S. Bankruptcy Code, the court concluded that extending comity to the British bankruptcy proceeding was appropriate.¹²⁶

In *Allstate Life Ins. Co. v. Linter Group*¹²⁷ the court, proceeding on a very expansive view of comity, upheld the district court's dismissal of two securities fraud actions brought in district court by U.S. creditors, in favor of pending liquidation proceedings in Australia.¹²⁸ The Second Circuit determined that even the presence of a forum selection and choice of law clause¹²⁹ in the Indebenture Agreement did "not preclude a court from granting comity where it was otherwise warranted."¹³⁰ The court stated that although Australian bankruptcy procedures differed slightly from U.S. bankruptcy procedures,¹³¹ the

¹²⁴ *Id.* at 810.

¹²⁵ *Id.*; see also *Clarkson Co. v. Shaheen*, 544 F.2d 624, 630 (2d Cir. 1976) (recognizing the right of a Canadian trustee in bankruptcy to obtain records of the foreign bankrupt debtor which were located in the debtor's New York offices, and stating that when dealing with sister common-law jurisdictions, such as Canada, exceptions to extending comity should be narrowly construed, since these jurisdictions' procedures are similar to those of the United States).

¹²⁶ *Lindner Fund*, 143 B.R. at 810. The court observed that the dismissal of the creditors' action would not unduly prejudice the creditors since by filing their claims in the British bankruptcy proceeding, they would be placed in the same position as Polly Peck's other creditors. *Id.* More importantly, even if the action had been allowed to proceed in district court, the creditors would still be forced to go to England to collect any judgment in their favor, since Polly Peck had no assets in the United States. *Id.*

¹²⁷ 994 F.2d 996 (2d Cir. 1993). Two actions were consolidated for this appeal. Both actions were brought by U.S. creditors who had invested in the Australian debtor companies. *Id.* at 997. The Australian debtors had filed for liquidation in Australia before these actions were commenced in district court. *Id.* at 997-98.

¹²⁸ *Id.* at 1000.

¹²⁹ The Indebenture Agreement contained a clause selecting New York as the forum for dispute settlements and New York law to govern the agreement. *Id.*

¹³⁰ *Id.* The *Linter* court was not the first court to conclude that forum selection clauses were not dispositive on the issue of comity. See *Kenner Prods. Co. v. Societe Fonciere et Financiere Agache-Willot*, 532 F. Supp. 478, 479-80 (S.D.N.Y. 1982). In *Kenner*, the district court transferred the creditor's action to the court's suspense docket, pending a termination of the bankruptcy proceedings that the debtor was currently involved with in France. *Id.* at 480. The court found that a choice of venue clause contained in a guaranty of trade credit did not override "concerns for comity and judicial efficiency." *Id.* at 479. While such clauses were prima facie valid, they would not be enforced if doing so would be "unreasonable." *Id.* at 479-80. The court stated that "public policy [was] a key factor in making a determination of reasonableness." *Id.* For criticism of the *Kenner* court's interpretation of choice of venue clauses, see *Morales & Deutsch*, *supra* note 2, at 1583.

¹³¹ Creditors argued that Australian bankruptcy law differed significantly from that of the United States because Australian law provides a stay by leave of court only, whereas the U.S. Bankruptcy Code provides for the automatic staying of creditor actions once a bankrupt debtor filed for bankruptcy. *Linter*, 994 F.2d at 999. Creditors challenged this difference as being fundamentally unfair to creditors. *Id.*

difference was irrelevant because what was really important was that Australian law provided a stay procedure to centralize claims and to ensure the equitable distribution of assets.¹³² Because Australian law provided this protection, affording comity to the Australian bankruptcy proceedings did not violate U.S. law or public policy.¹³³

By contrast, in those recent cases where courts have refused to extend comity to foreign bankruptcy proceedings, the courts have based their decisions on either a clear violation of U.S. public policy,¹³⁴ or a narrow exception based on the particular facts of the case.¹³⁵

In *Drexel Burnham Lambert Group v. Galadari*¹³⁶ the Second Circuit refused to uphold the district court's extension of comity¹³⁷ to liquidation proceedings in Dubai, United Arab Emirates, after concluding that further inquiry into the fairness of the Dubai bankruptcy procedures and its consonance with U.S. bankruptcy law was necessary.¹³⁸ The court was concerned that U.S. courts had no experience with Dubai bankruptcy procedures, and that there existed disputed issues of material fact as to whether or not Dubai bankruptcy law was fair.¹³⁹ The court remanded the action to the district court with instructions that the district court conduct an evidentiary hearing to determine these issues, and that Drexel be afforded reasonable discovery.¹⁴⁰ The Second Circuit's main consideration in denying comity at this stage of the proceedings was the need for information from which the district court could find that the foreign bankruptcy procedures were consistent with the U.S. policy of equitable distribution of assets.¹⁴¹

¹³² *Id.* at 999-1000.

¹³³ *Id.* The court pointed out that there was no evidence suggesting that the U.S. creditors would be prejudiced by being required to maintain their actions in Australia, especially since they had been given notice of all that occurred in the Australian bankruptcy proceedings, were represented in those proceedings, and had filed two other securities actions, similar to the actions before the district court, in other Australian courts. *Id.* at 1000.

¹³⁴ Of course, a court's ability to deny comity on the ground that the extension of comity in a particular case would "violate public policy," a rather undefined concept, could threaten to swallow up the recently-emerging general rule favoring the extension of comity.

¹³⁵ See *infra* notes 142-54 and accompanying text.

¹³⁶ 777 F.2d 877 (2d Cir. 1985).

¹³⁷ The district court had granted the debtor's representative's (composed of a committee of receivers appointed by decree of the Dubai government) motion to dismiss securities fraud action brought by the creditor (Drexel) which was pending before the court, basing its decision on the comity doctrine. *Id.* at 878.

¹³⁸ *Id.* at 881.

¹³⁹ *Id.*

¹⁴⁰ *Id.* On remand, the district court found that the Dubai bankruptcy proceedings were "consistent with [the U.S.] basic notions of fairness and due process" and "fundamentally fair to all creditors." *Drexel Burnham Lambert Group v. Galadari*, No.84-2602, 1987 U.S. Dist. LEXIS 5030, at *49 (S.D.N.Y. 1987). In making this showing, it was not necessary for the Dubai bankruptcy procedures (established by a government decree) to be "substantially similar" to the U.S. Bankruptcy Code. It was sufficient to show that the approach adopted by the Dubai proceeding was fundamentally fair. *Id.* The district court then stayed the action, extending comity to the pending Dubai bankruptcy proceedings. *Id.* at *71.

¹⁴¹ *Drexel*, 777 F.2d at 881.

In *Petition of Banco Nacional de Obras y Servicios Publicos, S.N.C. (Banobras)*,¹⁴² the bankruptcy court denied comity to a Mexican bankruptcy proceeding on the grounds that resolving the action involved the construction of U.S. labor law,¹⁴³ "a specialized area of the law laced with strong policy considerations."¹⁴⁴ The court found that the plaintiffs would be "severely prejudiced"¹⁴⁵ if forced to litigate their claims—which stemmed from a disputed collective bargaining agreement—in Mexico where the Mexican bankruptcy court would be called upon to construe and apply U.S. labor law, an area in which traditional contract principles were not strictly applied, and in which policy considerations abound.¹⁴⁶ Thus, the *Banobras* court etched a limited and well-defined exception to the general rule favoring the extension of comity: a court could deny comity when the law to be applied by a foreign bankruptcy court required "special expertise" in an area of U.S. law having strong policy overtones.¹⁴⁷

In *Overseas Inns S.A. P.A. v. United States*,¹⁴⁸ a Luxembourg corporation had filed for bankruptcy in Luxembourg and had obtained a court-approved reorganization plan.¹⁴⁹ The Luxembourg bankrupt debtor requested that the district court grant comity to the Luxembourg judgment and reorganization plan which would have allowed the debtor to satisfy its U.S. income tax obligations by paying a fraction of the taxes actually owed.¹⁵⁰ The Fifth Circuit upheld the district court's denial of comity, stating that the U.S. has a strong public policy favoring the payment of taxes owed, even by a taxpayer in bankruptcy.¹⁵¹ The court noted that under U.S. bankruptcy law, the Inter-

¹⁴² 91 B.R. 661 (Bankr. S.D.N.Y. 1988). Although this is a § 304 ancillary action, the court stated that "[w]hen asked to grant relief pursuant to § 304, American courts are to be guided by principles of international comity and respect for the laws of other nations." *Id.* at 667. The court's analysis stressed the comity factor, § 304(c)(5), more heavily than the other factors. *Id.*

¹⁴³ In *Banobras*, plaintiffs, employees of the Mexican airline, Aeromexico, which was owned by Aeronaves, sought declaratory relief that a collective bargaining agreement was in full force, and requested that the court determine their rights according to the agreement. *Id.* at 663. Subsequent to the filing of the action for declaratory relief, Aeronaves commenced bankruptcy proceedings in Mexico, and the bankruptcy trustee sought an injunction under § 304 to prevent U.S. creditors from pursuing claims against Aeronaves or going after its assets located in the United States. *Id.* at 663-64. The injunction was granted. *Id.* at 664. Plaintiffs then sought to have the injunction modified to allow their action for declaratory judgment to proceed in the United States. *Id.* at 662.

¹⁴⁴ *Id.* at 667.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 667-68.

¹⁴⁷ *Id.*

¹⁴⁸ 911 F.2d 1146 (5th Cir. 1990).

¹⁴⁹ *Id.* at 1147. The Internal Revenue Service (IRS), the creditor in this action, had received a copy of the plan but had not entered an appearance in the Luxembourg bankruptcy proceedings or filed a claim with the foreign court because the IRS' policy was not to participate in such proceedings since it usually was awarded less than the amount actually owed. *Id.*

¹⁵⁰ *Id.* at 1147-48.

¹⁵¹ *Id.* at 1149.

nal Revenue Service (IRS) was a secured creditor with priority status, whereas under the Luxembourg reorganization plan, the IRS was to be treated as an unsecured creditor.¹⁵² Comity, the court explained, "does not reach so far as to allow one country to adversely affect another's tax revenues."¹⁵³ The court held that Luxembourg bankruptcy laws were clearly dissimilar to that of the United States, and that extending comity to the Luxembourg judgment would therefore prejudice the United States.¹⁵⁴

In the case most relied upon by the *Philadelphia Gear* court, *Remington Rand Corp. v. Business Systems Inc.*,¹⁵⁵ special circumstances led the court to create a specific plan for the extension of comity to foreign bankruptcy proceedings. In *Remington*, Remington U.S. had filed a claim in district court against BSI B.V. and BSI U.S.¹⁵⁶ alleging that BSI B.V. had misappropriated documents containing Remington U.S.' trade secrets in a typewriter.¹⁵⁷ Subsequent to the filing of the misappropriation claim, BSI B.V. entered into bankruptcy proceedings in The Netherlands.¹⁵⁸ While the Dutch bankruptcy proceedings were pending, the district court ruled on Remington U.S.' misappropriation claim, finding that BSI B.V. had misappropriated Remington U.S.'

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1149-50. See also *In re Liquidating Comm. of Papeleras Reunidas, S.A.*, 92 B.R. 584 (Bankr. E.D.N.Y. 1988) [hereinafter *Papeleras*]. In *Papeleras*, the bankruptcy court dismissed the foreign representative's § 304 ancillary action, thereby allowing the U.S. creditor's action to proceed against the Spanish bankrupt debtor. *Id.* at 595. The court refused to extend comity to the Spanish bankruptcy proceedings on the ground that the creditors would be prejudiced because of the dissimilarity between the relevant Spanish bankruptcy laws and the U.S. bankruptcy laws. *Id.* at 591. Under U.S. bankruptcy laws, the creditor in this action (who had obtained a judgment lien on the debtor's U.S. trademark) was classified as a secured creditor, whereas under Spanish bankruptcy laws, a judgment lien creditor would be classified as a general, unsecured creditor. *Id.* Moreover, the court found that the creditor had not received timely notice of the Spanish bankruptcy proceeding and was therefore not even listed as a creditor. *Id.* at 590-91. As a result, the creditor's rights had been prejudiced. *Id.* For an in-depth critique of the *Papeleras* court's review of § 304(c) factors, see Booth, *supra* note 78, at 192-200.

¹⁵⁵ 830 F.2d 1260 (3d Cir. 1987). The parties involved in this complex litigation are as follows: Remington Rand Corporation, a U.S. corporation (hereinafter Remington U.S.); its bankrupt subsidiary, Remington Rand B.V., a Dutch corporation (hereinafter Remington B.V.); Business Systems, Inc., B.V., a Dutch corporation (hereinafter BSI B.V.); and its subsidiary, BSI Office Equipment, Inc. (hereinafter BSI U.S.). If the Note is referring to both BSI B.V. and BSI U.S. collectively, "BSI" will be used.

¹⁵⁶ The initial complaint was filed on August 17, 1981. *Id.* at 1262. The only defendant listed at that time was BSI B.V. *Id.* Remington U.S. subsequently amended its complaint on May 11, 1983, to add BSI U.S. as a defendant. *Id.*

¹⁵⁷ *Id.* Remington U.S. claimed the misappropriation occurred when BSI B.V. purchased a Dutch plant previously owned by Remington U.S.' Dutch subsidiary, Remington B.V. Remington B.V. had filed for bankruptcy in The Netherlands. The purchase agreement was for the sale of Remington B.V.'s Dutch plant and was entered into by BSI B.V. and the Dutch trustees in charge of handling the estate of Remington B.V. *Id.*

¹⁵⁸ *Id.* at 1263. BSI B.V. entered into suspension of payments proceedings in The Netherlands on August 17, 1983, and was appointed a trustee by the Dutch court. *Id.* A "suspension of payments" proceeding is similar to filing a Chapter 11 petition for reorganization under the U.S. Bankruptcy Code. *Id.* at 1262.

trade secrets.¹⁵⁹ The district court entered an interim equitable relief order¹⁶⁰ which required BSI to: (1) turn over copies of all documents containing Remington U.S.' trade secrets in their possession; (2) account for all the goods it produced with the misappropriated documents; and (3) hold in trust all products or proceeds (wherever located in the world) that BSI derived from the trade secrets, or alternatively, to provide security¹⁶¹ equivalent to their value.¹⁶²

The Third Circuit upheld the district court's finding that BSI B.V. had misappropriated Remington U.S.' trade secrets¹⁶³ and the portion of the equitable relief order requiring BSI to turn over the documents it held.¹⁶⁴ However, with respect to the district court's imposition of a constructive trust on all products and proceeds that BSI derived worldwide from the documents as a means of providing security for Remington U.S.' subsequent damages award, the Third Circuit stated that:

[T]o the extent that the district court order seeks to attach *BSI assets in the United States*, it [would] not be disturbed. No international trap-pings surround the district court's imposition of a constructive trust over assets located in the United States. [The court] saw no aspects of comity implicated here.¹⁶⁵

¹⁵⁹ *Id.* at 1263. The decision was entered on September 6, 1984. *Id.* The misappropriation of trade secrets consisted of voluminous documents and drawings that came to be in the possession of BSI B.V. as a result of its purchase of Remington B.V.'s plant in The Netherlands. *Id.* at 1268.

¹⁶⁰ *Id.* at 1263. The interim equitable relief order was entered on September 6, 1984, to provide security for the damages judgment that Remington U.S. was expected to secure, once the extent of the damages for the tortious misappropriation of trade secrets was ascertained. *Id.* Final judgment on damages was entered on June 27, 1986, at \$221,409,481.00, later increased as a result of sanctions imposed by the district court against BSI B.V. and its trustee for contempt in failing to abide by the requirements of the equitable relief order. *Id.*

¹⁶¹ *Id.* BSI could not post such security so that the requirement of holding the proceeds in trust became mandatory. *Id.* at 1267.

¹⁶² *Id.* at 1263. BSI appealed, challenging the district court's finding of misappropriation of trade secrets, *id.*, and arguing that the district court had violated principles of international comity by entering an order for equitable relief when BSI B.V. was in suspension of payments proceedings in The Netherlands. *Id.* at 1266.

¹⁶³ *Id.* at 1265. BSI also argued that because a Dutch court approved the trustees' sale to BSI B.V. of Remington B.V.'s plant, which included the documents containing trade secrets, comity precluded the district court from even inquiring into the propriety of the sale and purchase agreement. *Id.* at 1266. The Third Circuit responded that the district court had not abused its discretion in refusing, on the grounds of comity, to refrain from inquiring into the propriety of the trustees' sale because although the Dutch court handling Remington B.V.'s bankruptcy had entered an order approving the sale of the Dutch plant, the district court found that the know-how documents containing Remington U.S.' trade secrets were not included within the Dutch court's order as an asset of the sale. *Id.* at 166-67. Therefore, the Dutch court's order approving the sale did not encompass the sale of the know-how documents. *Id.*

¹⁶⁴ *Id.* at 1269. The turn-over order was entitled to compliance by BSI because the question of ownership of the documents had been fully litigated in the district court and no contrary ruling had been entered by the Dutch bankruptcy court. *Id.* In fact, the Dutch court had agreed with the turn-over order, provided that Remington U.S. pick up the documents in The Netherlands or else compensate BSI for its expenses in shipping the documents to the United States. *Id.* The Third Circuit reasoned that the turn-over order "[did] not offend comity or derogate[] the respect due the Dutch bankruptcy proceedings." *Id.*

¹⁶⁵ *Id.* at 1272 (emphasis added). On September 6, 1984, when the district court en-

However, as to the attachment of BSI's foreign assets, the court stated the same was not true.¹⁶⁶ Before that aspect of the order could be upheld certain "conditions precedent" had to be satisfied.¹⁶⁷ The court focused on the scope of the district court's equitable relief order, emphasizing that the order "imposed a trust on all BSI assets anywhere in the world," effectively tying up the bankrupt debtor, BSI B.V.'s, "entire property for the ultimate benefit of Remington U.S., to the exclusion of all other creditors."¹⁶⁸ Because the constructive trust operated directly on the property of the debtor outside the territorial limits of the United States, involving property under the protection of the Dutch bankruptcy laws, the equitable relief order interfered with the administration of BSI B.V.'s bankruptcy in The Netherlands, and ignored the very reasons for the doctrine of comity.¹⁶⁹ However, due to what the court deemed were special circumstances involved in the case, the court proposed a detailed, case-specific "solution" before comity could be extended to the Dutch bankruptcy proceedings.¹⁷⁰

IV. Analysis of the Case

The *Philadelphia Gear* court was presented with a district court, which for reasons undisclosed in its opinion, had chosen to ignore a foreign debtor's request for a stay of the declaratory judgment action pending before it, even though the debtor, PGMex, was currently involved in bankruptcy proceedings in Mexico. The decision in *Philadelphia Gear*¹⁷¹ is an important one for two reasons: first, the procedure the court outlined in its opinion for district courts to follow when determining whether to extend comity to foreign bankruptcy proceedings places a notable constraint on a district court's exercise of its discretion in making comity determinations.¹⁷² Second, the *Philadelphia Gear* court's opinion marks a clear shift in the Third Circuit's ap-

tered its constructive trust order, BSI B.V. was in bankruptcy proceedings, but BSI U.S., also a defendant in the action, was not. *Id.* BSI U.S. held assets in the United States to which the Dutch trustee laid claim. *Id.* Remington U.S. looked to these same assets for satisfaction of its later-to-be-determined damages judgment. *Id.* The district court had previously imposed restrictions on these U.S. assets. *Id.* The *Remington* court stated that although such a restriction "substantially hinder[ed] efforts by the BSI trustee to rehabilitate the debtor . . . the preexisting limitations on BSI U.S. did not directly frustrate the trustee's authority and extended only to assets in the United States." *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ The Third Circuit's proposed solution involved the use of "reciprocal comity." *Id.* at 1272-74.

¹⁷¹ *Philadelphia Gear* was decided solely on procedural grounds. The Third Circuit did not rule on whether the district court's implicit denial of comity to the Mexican court's Letter Rogatory was proper. Instead, the court remanded the action to the district court for the district court to evaluate the request for comity in light of the factors outlined in the *Philadelphia Gear* opinion, and for the district court to explain whatever decision it reached with regards to the comity issue. 44 F.3d 187, 193-94 (3d Cir. 1994).

¹⁷² See *infra* notes 175-83 and accompanying text.

proach to comity in the foreign bankruptcy context because it represents the Third Circuit's adoption of a broader view of comity than that which the court advocated when it decided *Remington*¹⁷³ less than a decade earlier.¹⁷⁴

A. *The Procedure for Comity Determinations in the Bankruptcy Context*

In *Philadelphia Gear*, the Third Circuit held that if a district court is presented with a prima facie request for a stay, the district court *cannot choose* to exercise its discretion to deny comity to a foreign bankruptcy proceeding without first considering the factors outlined in the *Philadelphia Gear* opinion.¹⁷⁵ Moreover, a district court could not deny comity to a foreign bankruptcy proceeding without clearly explaining why its balancing of such factors mandated a denial of comity.¹⁷⁶

As an initial matter, a foreign debtor would be deemed to have presented a prima facie case for a stay if the debtor showed: (1) that the foreign country shares the U.S. policy of equal distribution of assets, and (2) that the foreign law mandates or at least authorizes the issuance of a stay.¹⁷⁷ Applying this relatively easy two-prong test to the case before it, the court concluded that PGMex had established a prima facie case for the extension of comity to the Mexican bankruptcy proceeding because PGMex had presented the district court with a legal opinion from a Mexican attorney which interpreted Mexican law as complying with these two prongs.¹⁷⁸

Once the prima facie case has been established, the court seemed to suggest that an implicit presumption favoring the extension of comity to the foreign bankruptcy proceeding comes into play.¹⁷⁹ The court stated that the district court must now "consider the [comity] matter further and . . . not dismiss the request out of hand without explaining its ruling."¹⁸⁰ The district court must evaluate the request

¹⁷³ 830 F.2d 1260 (3d Cir. 1987).

¹⁷⁴ See *infra* notes 184-91 and accompanying text.

¹⁷⁵ *Philadelphia Gear*, 44 F.3d at 193-94.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 193.

¹⁷⁸ As far as establishing the first prong, the court remarked that although the Mexican attorney's opinion was somewhat ambiguous, the attorney's statement "seem[ed] to be stating" that Mexican bankruptcy law shared the U.S. policy of equal treatment of creditors, and as for establishing the second prong, the attorney's statement that Mexican law mandates the stay of the district court action was sufficient. *Id.* Although PGC, in opposing the extension of comity, presented a legal opinion that denied that Mexican law complied with these two prongs, the court stated that this difference in opinion was of no consequence at the prima facie stage because disputes as to which party's interpretation of foreign law is the correct one should be determined by the district court after an evidentiary hearing had been held. *Id.*

¹⁷⁹ *Id.* A presumption favoring comity is not an innovation of the *Philadelphia Gear* court. Several Second Circuit decisions have recognized a presumption favoring the extension of comity to foreign bankruptcy proceedings. See *supra* notes 111-33 and accompanying text.

¹⁸⁰ *Philadelphia Gear*, 44 F.3d at 193.

for a stay by relying on the following factors expressly delineated by the court: (1) whether the foreign court is a duly authorized tribunal; (2) whether the foreign law provides for equal treatment of creditors; (3) whether a stay would be in some manner inimical to U.S. interests; and (4) whether U.S. citizens would be prejudiced by the stay.¹⁸¹ Further, if the interpretation of the foreign law is disputed by the parties, the district court is required to conduct evidentiary hearings to ascertain whether or not the foreign law and procedures are consonant with those of the United States.¹⁸² If these factors are determined in favor of the party seeking comity, the court's opinion seems to suggest that the implicit presumption favoring comity requires that the district court extend comity to the foreign bankruptcy proceeding by staying the action before it. Thus, although a district court continues to have substantial discretion¹⁸³ in determining whether comity should be extended to foreign bankruptcy proceedings, the court seems to place a significant constraint on the district court's exercise of its discretion to deny comity because the procedure outlined by the Third Circuit operates as a presumption favoring comity once a *prima facie* case for comity is presented. This constraint results because the presumption favoring comity requires the district court to make factual findings in support of any *denial* of comity, instead of merely requiring the court to explain why comity should be extended.

B. *The Adoption of a Broad View of Comity*

In establishing a procedure for district courts to follow when making comity determinations in the bankruptcy context, the majority asserts that it is merely relying on its decision in *Remington*.¹⁸⁴ However, as the dissenting opinion points out, the majority's reliance on *Remington* is misplaced because what the Third Circuit is really doing in *Philadelphia Gear* is adopting a "broad view of comity" not supported by *Remington*.¹⁸⁵

¹⁸¹ *Id.* at 194. The Third Circuit compiled these factors by drawing from general principles of comity frequently referred to in the case law and organizing these principles into a coherent, structured list of factors so that a district court would know exactly what it should consider when making a comity determination.

¹⁸² *Id.* at 193.

¹⁸³ *Philadelphia Gear* did provide the district courts with a specific list of factors to consider in making comity determinations. *Id.* However, the third and fourth factors are rather vague. Because the Third Circuit failed to define the parameters of these two factors, a district court is left with substantial discretion in determining what is "in some manner inimical" to the interests of the United States, and what constitutes "prejudice" to a U.S. citizen. Although the Second Circuit also relies on these vague factors in determining if comity should be extended to foreign bankruptcy proceedings, the Second Circuit's case law specifies that these factors are to be narrowly construed as "exceptions" to the rule favoring comity. See *supra* note 78. The Third Circuit's *Philadelphia Gear* opinion, on the other hand, provides no real indication whether it too intends the district courts to construe these factors as narrow exceptions to the extension of comity.

¹⁸⁴ 830 F.2d 1260 (3d Cir. 1987).

¹⁸⁵ *Philadelphia Gear*, 44 F.3d at 194 (Roth, J., dissenting).

Judge Roth notes that in *Remington*, the doctrine of comity did not prevent the Third Circuit from upholding the district court's determination of a misappropriation claim brought by a U.S. corporation against a foreign debtor, *even though* the foreign debtor was involved at the time in a Dutch bankruptcy proceeding.¹⁸⁶ The *Remington* court did not even question why the district court chose to decide the misappropriation issue rather than to defer on the grounds of comity to the Dutch bankruptcy proceedings.¹⁸⁷ Moreover, the *Remington* court went so far as to uphold the district court's order attaching assets of the foreign debtor which were located in the United States, stating that the attachment of these assets did not implicate any aspect of comity, despite the fact that the attachment prevented the Dutch bankruptcy court's access to part of the debtor's assets and directly frustrated the foreign court's authority to rehabilitate the debtor.¹⁸⁸ The only aspect of the district court's order that the *Remington* court believed had any comity implications was the part of the order attaching the debtor's *foreign* assets.¹⁸⁹

Thus, the dissent is correct in arguing that if the *Philadelphia Gear* court were really following the dictates of *Remington*, the court should have upheld the district court's determination of PGC's declaratory judgment action, because the district court's determination of this action would neither implicate PGMex's foreign assets located in Mexico nor directly affect the ability of the Mexican bankruptcy court to distribute PGMex's assets to its creditors.¹⁹⁰ Instead, the procedure now adopted by the *Philadelphia Gear* court, which implicitly incorporates a presumption favoring comity and limits a district court's discretion in denying comity, may reasonably be viewed as representing the Third Circuit's shift away from the favoring of U.S. creditors and the court's willingness to join the modern trend¹⁹¹ favoring the extension of comity to foreign bankruptcy proceedings.

V. Conclusion

The court's opinion in *Philadelphia Gear*, if it indeed represents the Third Circuit's attempt to advocate a more expansive view of comity as

¹⁸⁶ *Id.* (Roth, J., dissenting).

¹⁸⁷ *Id.* (Roth, J., dissenting).

¹⁸⁸ *Remington*, 830 F.2d at 1272.

¹⁸⁹ *Id.*

¹⁹⁰ *Philadelphia Gear*, 44 F.3d at 194-95 (Roth, J., dissenting).

¹⁹¹ For a discussion of cases following the modern trend, see *supra* notes 83, 111-33 and accompanying text. See also Booth, *supra* note 78, at 139-47 for an outline of the development of the modern trend favoring the extension of comity; Kraft & Aranson, *supra* note 83, at 336 ("[B]efore the Code was amended to add § 304, the trend was for courts to recognize foreign bankruptcy proceedings [T]he policy of universality has generally been embraced by the courts"). See generally Booth, *supra* note 78, for an evaluation of the impact that § 304 has had on modern case law.

the dissent claims,¹⁹² is clearly a step in the right direction in helping district courts to deal with the increasing frequency with which they are presented with disputes involving foreign bankruptcies. The court's implicit recognition of a presumption favoring the extension of comity to foreign bankruptcy proceedings makes it easier for district courts to extend comity to foreign bankruptcy proceedings, at least in those cases where the foreign debtor seeks a *stay* of action(s) pending before the district court. Adoption of the "universality" approach to the extension of comity in the foreign bankruptcy context is consistent with the modern trend of courts, as evidenced by recent Second Circuit decisions.¹⁹³ Moreover, a more generous approach to comity helps further Congress' intention, as expressed by the enactment of section 304 of the Bankruptcy Code¹⁹⁴ to encourage cooperation among countries worldwide to solve bankruptcy disputes as fairly and as efficiently as possible. If courts extend comity to foreign bankruptcy proceedings, claims against the debtor may be handled in a single court, thereby preventing the squandering of a debtor's assets that inevitably results from the debtor being forced to litigate claims in courts all over the world. As a result, the extension of comity to foreign bankruptcy proceedings would help to ensure that there would be more assets left for equitable distribution to all creditors, thus furthering the "fundamental" public policy of U.S. bankruptcy law after all.¹⁹⁵

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¹⁹² *Philadelphia Gear*, 44 F.3d at 194 (Roth, J., dissenting).

¹⁹³ See *supra* notes 111-33 and accompanying text.

¹⁹⁴ See *supra* note 95 and accompanying text.

¹⁹⁵ See *supra* notes 65-67 and accompanying text, discussing the U.S. fundamental policy of distributing a debtor's assets in a fair and equitable manner to creditors.